

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

STAMP AND RETURN

Petition for Expedited Rule Making to)
Amend Sections 1.2105(a)(2)(xi) and)
1.2106(a) of the Commission's Rules)
and/or for Interim Conditional Waiver)

FILED/ACCEPTED

JUN - 8 2007

Federal Communications Commission
Office of the Secretary

EXPEDITED ACTION REQUESTED

**PETITION FOR EXPEDITED RULE MAKING
AND/OR FOR INTERIM CONDITIONAL WAIVER**

DIRECTV GROUP, INC.
Stacy Fuller
Vice President, Regulatory Affairs
444 N. Capitol Street, NW
Suite 728
Washington, DC 20001
(202) 715-2342

ECHOSTAR LLC
Linda Kinney
Vice President, Law & Regulation
1233 - 20th Street, NW
Washington, DC 20036
(202) 293-0981

June 8, 2007

TABLE OF CONTENTS

SUMMARY	ii
I. THE PURPOSE OF THE FORMER DEFAULTER RULES	2
II. THE FORMER DEFAULTER RULES HAVE BEEN APPLIED IN AN OVERLY-BROAD MANNER WHICH IS NOT TARGETED TO ACHIEVE THEIR UNDERLYING PURPOSES	5
III. REQUEST FOR INITIATION OF RULE MAKING PROCEEDING TO AMEND FORMER DEFAULTER RULES	7
IV. REQUEST FOR INTERIM CONDITIONAL BLANKET WAIVER OF FORMER DEFAULTER RULES FOR THE 700 MHZ AUCTION	8
A. Any Waiver Should Be Limited and Conditional	9
B. The Applicable Waiver Standard Is Met	11
C. Waiver in the Present Circumstances Is Consistent With Commission Precedent	12
V. CONCLUSION	14

SUMMARY

The Commission has a legitimate interest in ensuring that bidders in FCC auctions are capable of satisfying the financial obligations that result from their auction participation. To that end, the Commission has adopted so-called “former defaulter” rules, 47 C.F.R. §§ 1.2105(a)(2)(xi) and 1.2106(a), the purpose of which is to require certain auction applicants – those with “poor Federal financial track records” – to submit a 50 percent higher upfront payment than other applicants. As currently written, however, the former defaulter rules sweep too broadly, imposing the upfront payment premium on auction applicants whose Federal financial track records – while not completely unblemished – are certainly not “poor” and whose capability and inclination to make good on their auction bids are beyond question.

Because the former defaulter rules are overbroad, they are applied in ways that are unrelated to their purpose. The public interest is disserved when unnecessary costs are imposed upon auction applicants whom the rules were never intended to target, and Petitioners seek an expedited rule making proceeding to amend the rules. The former defaulter rules can be easily tailored so that they are not applied in an overbroad manner. Petitioners request that the Commission amend the former defaulter rules to (1) establish a *de minimis* exemption, (2) set a time limitation on former defaults and delinquencies, and (3) clarify that the non-tax Federal debt histories of entities and individuals who are irrelevant to an applicant’s auction participation need not be considered under the rules.

In the event that the requested amendment cannot be accomplished prior to the deadline for the submission of applications to participate in the upcoming auction of licenses in the 700 MHz band, Petitioners request that the Commission grant a limited interim conditional waiver of the rules, as described herein, to entities that apply to participate in that auction.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Petition for Expedited Rule Making to)
Amend Sections 1.2105(a)(2)(xi) and)
1.2106(a) of the Commission's Rules)
and/or for Interim Conditional Waiver)

To: The Commission

EXPEDITED ACTION REQUESTED

**PETITION FOR EXPEDITED RULE MAKING
AND/OR FOR INTERIM CONDITIONAL WAIVER**

DIRECTV Group, Inc. and EchoStar LLC ("Petitioners"), by their attorneys and pursuant to Sections 1.3, 1.401 and 1.925 of the Commission's Rules,¹ respectfully request that the Commission initiate an expedited rule making proceeding to amend Sections 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules² (the "former defaulter rules") so as to tailor their application to more effectively serve their underlying purposes, and/or grant a limited interim conditional waiver of the rules as outlined herein. Petitioners respectfully request action on the rule making proceeding prior to the deadline for submission of Form 175 short-form applications to participate in the upcoming auction of spectrum in the 700 MHz spectrum band (the "700 MHz Auction"), which must commence prior to January 28, 2008.³ In the event that the proposed amendment to

¹ 47 C.F.R. §§ 1.3, 1.401 and 1.925.

² 47 C.F.R. §§ 1.2105(a)(2)(xi) and 1.2106(a).

³ The Commission is required under the Digital Television Transition and Public Safety Act of 2005 to commence the 700 MHz Auction by January 28, 2008. See Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

the former defaulter rules cannot be made prior to the deadline for submission of applications to participate in the 700 MHz Auction, Petitioners respectfully request that the Commission adopt an interim conditional waiver of the rule for purposes of that auction. As demonstrated below, the former defaulter rules as currently written apply too broadly to effectively advance the Commission's goal of ensuring that auction bidders are financially reliable. Modification of the former defaulter rules to more effectively target their application in the 700 MHz Auction and in future auctions would advance the public interest.

I. THE PURPOSE OF THE FORMER DEFAULTER RULES

In the aftermath of the bankruptcy of multiple C Block PCS licensees, the Commission understandably wished to adopt measures that would help to ensure the integrity of future auctions and provide additional security that auction bidders could satisfy financial obligations arising from their auction participation, without discouraging participation in auctions by serious qualified bidders. To that end, in anticipation of the re-auction of C Block PCS licenses, the Commission in 1998 adopted a rule requiring prospective bidders who had previously defaulted on FCC licenses or been delinquent on non-tax Federal debt ("former defaulters") to pay fifty percent higher upfront payments than other auction applicants.⁴

The Commission decided not to preclude former defaulters from participation in FCC auctions, stating "we believe that past business misfortunes do not inevitably preclude an entity from being able to meet its present and future responsibilities as a

⁴ *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Fourth Report and Order, 13 FCC Rcd 15743, 15753 (1998) (adopting Section 24.706 of the FCC's Rules).

Commission licensee,” as long it makes the required additional upfront payment.⁵ The Commission incorporated the former defaulter rules into its general auction rules two years later, finding again that former defaulter status should not disqualify a party from an auction, but that “the integrity of the auctions program and the licensing process dictates requiring a more stringent financial showing from applicants with a poor Federal financial track record.”⁶

When the former defaulter rules were initially adopted, it was not apparent how broadly they would be applied. The Further Notice of Proposed Rule Making that raised this issue asked only whether the Commission should restrict participation in the auction to “entities” that had not defaulted on FCC payments, and whether, if it were to allow defaulting entities to participate, the Commission should require them to submit higher upfront payments in order to participate in auctions.⁷ When the Commission adopted the rules in the PCS auction context, it still did not indicate how broadly the rules would be applied. In the order adopting the rules for the PCS auction, the FCC stated that “former defaulters, *i.e.*, *applicants* that have defaulted or been delinquent in the past, but have since paid all of their outstanding non-Internal Revenue Service Federal debts and all

⁵ *Id.*, 13 FCC Rcd at 15754.

⁶ *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 15293, 15317 (2000). Reflecting its continued sensitivity to the vast number of bankruptcies sweeping through the telecommunications sector, the Commission made an express reference to its finding that the 50 percent additional upfront payment required of former defaulters did not violate the automatic stay provision of the Bankruptcy Code. *Id.*, 15 FCC Rcd at 15318, n. 146.

⁷ *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, Second Report and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 16436 (1997), para. 84.

associated charges or penalties..." would be allowed to participate in the auction.⁸ The rule as adopted states merely that "[a]ny C block *applicant* that has previously been in default ..." would be required to submit the additional upfront payment.⁹ Thus, it is not surprising that, while commenters generally opposed the requirement that former defaulters pay an upfront payment premium, they did not comment in depth upon the potentially broad application and implications of the former defaulter rules.¹⁰

Further, when the Commission later incorporated the former defaulter rules into its general auction rules in 2000, it acted on its own motion and not in response to comments or requests addressing the issue.¹¹ It was only then that it became clear how broadly the Commission intended to apply its former defaulter rules – the Commission stated that the rules would apply not only to the applicant itself, but also to its affiliates and its controlling interests as defined in Section 1.2110 of the Commission's rules – which definition was adopted by that very same order.¹² Thus, the Commission incorporated the former defaulter rules into its general auction rules on its own motion, and participants in this rule making proceeding had no way to know that the former defaulter rules were to be applied in the future not just to applicants and their controlling

⁸ *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Fourth Report and Order, 13 FCC Rcd at 15754 (emphasis added).

⁹ 47 C.F.R. § 24.706 (1998) (emphasis added).

¹⁰ See *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Fourth Report and Order, 13 FCC Rcd at 15753 (FCC notes that commenters exhibited "little reaction to the idea of holding an expedited hearing or requiring defaulters to submit a higher upfront payment amount.").

¹¹ *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 15316 (2000).

¹² *Id.*, 15 FCC Rcd at 15317.

interests, but also to officers and directors of both applicants and their controlling interests.

II. THE FORMER DEFAULTER RULES HAVE BEEN APPLIED IN AN OVERLY-BROAD MANNER WHICH IS NOT TARGETED TO ACHIEVE THEIR UNDERLYING PURPOSES

Petitioners support the underlying purposes of the former defaulter rules. It is entirely appropriate for the Commission to subject entities with a "poor Federal financial track record" to the rules. It has become clear, however, that the former defaulter rules simply sweep too broadly in attempting to advance the Commission's goal of financially reliable bidders.

First, the rules themselves apply to an overly inclusive range of people and entities. The rules reach not only to controlling companies of the applicant, but also to officers and directors¹³ of the applicant and of its controlling interests. Thus, the Federal debt payment history of an officer or director of a company far up the corporate chain from an auction applicant is automatically relevant to whether the applicant is a former defaulter – even if that person has no involvement in or control over the applicant's affairs and even if the default or delinquency pertains to a personal obligation to the Federal government (as opposed to one pertaining to the applicant). As a result, for example, if a vice president for human resources of a parent company to an auction applicant had ever had a personal Federal debt delinquency, the applicant would be required to identify itself as a former defaulter and to pay the additional upfront payment. Clearly, such a result does not serve the underlying purpose of these rules. The former defaulter rules should be more narrowly tailored so that they reach only those entities and

¹³ Section 1.2110 of the Commission's Rules, which defines "controlling interest," provides that officers and directors of an applicant, as well as officers and directors of entities that control the applicant, "shall be considered to have a controlling interest" in the applicant. 47 C.F.R. § 1.2110(c)(2)(ii)(F).

individuals whose payment histories actually reflect on the creditworthiness of the applicant.

In addition, the former defaulter rules currently include neither a minimum threshold amount for a prior delinquency nor any time limit, so regardless of its overall good record of Federal debt payments, a bidder may be required to pay the upfront payment premium because of a single small delinquency that occurred in the distant past and was promptly cured. Under the rules, a publicly-traded company with billions in annual revenues would be required to submit the fifty percent upfront payment premium because of a late \$10 payment of a Federal debt twenty years ago, even if thousands of other Federal payments for millions of dollars have been made on time. Clearly, there is no rational connection between that type of former delinquency and the ability or inclination of a prospective auction bidder to meet its obligations as an auction winner.¹⁴

The broad application of the former defaulter rules has resulted in the fifty percent upfront payment premium being paid even where an applicant does *not* have a "poor Federal financial track record," and where the applicant's ability to meet its "future financial responsibilities" has been well-demonstrated. Because auction participants do not receive interest on their upfront payments, the current overly-broad application of the former defaulter rule imposes substantial unnecessary costs on bidders whom the rule was not intended to reach.¹⁵

¹⁴ The folly of the current rule is best illustrated by combining the two previous examples: a \$10 dollar delinquency owed by an officer or director of an applicant's parent company on a personal non-tax Federal debt, which was paid off 20 years ago, would nonetheless result in former defaulter status for the applicant.

¹⁵ In FCC Auction No. 66, for example, three large company bidders (Wireless DBS, Cingular AWS, and Cellco Partnership d/b/a Verizon Wireless) and three smaller companies (Leaco Rural Telephone Cooperative, Roberts Company Telephone Cooperative, and Innovative Communications Corporation) identified themselves as "former defaulters" on their pre-auction applications, and as a result were required to make excess upfront payments totaling \$618,920,166. Assuming a 6 percent cost of capital and a

Imposing undue auction-related costs is unfair to auction applicants with good Federal financial track records, but that is not the only reason to narrow the scope of the rule as suggested here. These unfair costs can unnecessarily interfere with the auction process by reducing applicants' demand for spectrum, contravening the Commission's policy – and the intent of Section 309(j) of the Communications Act – of awarding spectrum to the applicant who values it most highly.¹⁶ In addition, adding a 50 percent premium to the required upfront payment will likely discourage maximum participation in future auctions by financially sound bidders.

As demonstrated in Auction 66, the rule potentially affects companies large and small. With the high anticipated value of the 700 MHz licenses that will be auctioned soon, it is critical that the Commission take action to address this problem expeditiously.

III. REQUEST FOR INITIATION OF RULE MAKING PROCEEDING TO AMEND FORMER DEFAULTER RULES

As noted above, Petitioners agree that the Commission has the right to seek additional assurance that auction applicants with prior defaults or poor Federal financial track records will satisfy their auction obligations. The current former defaulter rules, however, as broadly applied with no minimum thresholds and no limitations, have imposed fifty percent upfront payment premiums on auction applicants whom the rules were never intended to target. The rules should be tailored so that they are more

holding period of 79 days (the period from the upfront payment deadline to the down payment deadline for Auction 66), the cost to these six bidders of the loss of the use of these funds totaled \$8,037,484. (Wireless DBS withdrew from bidding in Auction 66 and received a refund of its upfront payment prior to the auction's conclusion, so the holding period applicable to it was shorter than 79 days.)

¹⁶ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2349 (1994).

rationaly applied to the individuals and entities about whom the Commission is legitimately concerned.

The rules can easily be amended in three ways to accomplish this:

- Former defaults/delinquencies of a *de minimis* nature should be excluded from the scope of the former defaulter rules;
- Prior delinquencies and defaults that are more than a certain number of years old should be excluded from the scope of the former defaulter rules; and
- The rules should apply only to auction applicants and to individuals or entities that are in a position to affect whether such applicants meet their auction-related financial responsibilities.

Modifying the former defaulter rules as suggested above would advance the public interest by producing a more rational balance between the need to require applicants to adequately demonstrate their ability to meet their financial obligations and the need to avoid imposing undue costs on qualified auction bidders whose Federal financial track records are good. These modifications also will minimize the extent to which auction participation might be suppressed by an unnecessary application of the rules. Through these relatively simple changes, the Commission can ensure that the upfront payment premium is required only of applicants whose "poor Federal financial track record" gives rise to a real need for a "more stringent financial showing."

IV. REQUEST FOR INTERIM CONDITIONAL BLANKET WAIVER OF FORMER DEFAULTER RULES FOR THE 700 MHz AUCTION

For the reasons discussed above, the former defaulter rules should be amended because their overly-broad application imposes significant costs on prospective bidders whose auction *bona fides* cannot be seriously questioned. In Auction 66, companies with stellar payment records were forced to finance hundreds of millions of dollars of unnecessary upfront payments. These costs are likely to be felt at least as acutely in the

upcoming 700 MHz Auction, where upfront payments may be higher than they were in Auction 66. In the event the Commission does not adopt amendments to the former defaulter rules as suggested above prior to the deadline for submission of FCC Form 175 applications to participate in the 700 MHz Auction, Petitioners respectfully request that an interim conditional waiver of the former defaulter rules be granted for purposes of the 700 MHz Auction.¹⁷ A grant of the requested waiver would preserve the Commission's underlying objectives while eliminating the inequities and distortions that result from the rule's current application. Grant of a waiver is thus consistent with the public interest and with the Commission's rules and precedent.

A. Any Waiver Should Be Limited and Conditional

Petitioners are not suggesting that the Commission sweep away the former defaulter requirements through a general waiver for the 700 MHz Auction. Instead, any waiver of the rules for this auction should be limited and subject to the satisfaction of certain conditions. Without seeking to limit the Commission's discretion to craft the conditions it deems appropriate to qualify an applicant for this waiver, Petitioners below suggest examples of how a waiver could be targeted to better achieve the rules' underlying purposes.

An auction applicant could be relieved of the obligation to identify itself as a former defaulter and to make the additional upfront payment as a result of former defaults and delinquencies:

- occurring more than three years prior to the deadline for filing FCC Form 175 applications to participate in the 700 MHz Auction;

¹⁷ The waiver requested herein could be granted by the Wireless Telecommunications Bureau pursuant to authority delegated to it under Sections 0.131(a) and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

- relating to a personal obligation of an officer or director of an entity that is not the auction applicant (*i.e.*, officers/directors of parent entities);
- totaling less than the lesser of (1) 0.1% of the average annual gross revenues attributable to the auction applicant (using the attribution rules of Section 1.2110 of the FCC's rules), or (2) One Hundred Thousand Dollars (\$100,000.00).

These waiver conditions are designed to separate former defaults and delinquencies that are indicative of a truly poor Federal financial track record (and thus relevant to the Commission's comfort level as to applicants' inclination and ability to satisfy their auction obligations) from those that are not. These conditions would enable large and small applicants alike to avoid making an additional 50 percent upfront payment if, despite having a former default or delinquency, that former default or delinquency does not truly call into question the applicant's financial *bona fides* in the auction. Petitioners submit that the suggested waiver conditions are reasonable vehicles that will enable the Commission to obtain the needed assurance of applicants' financial capabilities and still avoid forcing entities with generally good Federal financial track records to obtain more financing to participate in the 700 MHz Auction than is necessary.

Under the proposed standard, a small business (*e.g.*, up to \$40 million in attributable gross revenues) could have up to \$40,000 in cured delinquencies without being labeled a former defaulter. Large carriers whose revenues are in the billions of dollars, and whose total Federal payments amount in some cases to tens of millions of dollars, would be limited to \$100,000 in cured delinquencies. A three-year time limitation would be consistent with federal tax law, which generally requires that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . . and no proceeding in court without assessment for the collection of such tax

shall be begun after the expiration of such period.”¹⁸ Finally, it is appropriate to exclude defaults and delinquencies arising from the personal activities of officers and directors of entities up the corporate chain from the auction applicant, since these personal matters have no logical bearing on the applicant’s ability or inclination to satisfy financial obligations arising from its auction participation.

B. The Applicable Waiver Standard Is Met

The Commission’s rules require a waiver proponent to show that: (i) the underlying purpose of the rule would not be served or would be frustrated by its application to the instant case, and grant of the waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the specific situation, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the entity requesting the waiver has no reasonable alternative.¹⁹ If applied in the 700 MHz Auction as in the past, the effect of the former defaulter rules would bear no relationship to their underlying purpose.²⁰ Furthermore, a conditional waiver of the rules would serve the public interest by relieving auction applicants whose auction *bona fides* could not be seriously questioned from incurring the financial cost associated with the upfront payment premium. Good public policy dictates that these companies be allowed

¹⁸ See 26 U.S.C § 6501(a). In cases where fraud or failure to file a return is involved, the relevant period is extended to six years. *Id.*

¹⁹ See 47 C.F.R. §§1.3, 1.925; see also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (waiver of the rules may be granted in instances where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question).

²⁰ Any entity that ever has identified itself in the past as a “former defaulter” would be required to do so again in its short-form application to participate in the 700 MHz Auction, even if its Federal debt payment record has been unblemished for years.

to put these funds to use for purposes determined by marketplace forces, not by overbroad application of regulations.

The standard for grant of an interim waiver of the former defaulter rules is satisfied in these circumstances. For the same reasons that amendment of the rule is warranted, an interim conditional waiver of the rule should be granted for the 700 MHz Auction.

C. Waiver in the Present Circumstances Is Consistent With Commission Precedent

The Commission has frequently waived its rules in circumstances when its rules or decisions are subsequently determined to be overbroad,²¹ or when the rule at issue is the subject of a pending rulemaking proceeding.²² Indeed, "waiver processes are a permissible device for fine tuning regulations, particularly where, as here, the Commission [has] enact[ed] policies based on 'informed prediction.'"²³ The

²¹ See *Amendment of Section 22.922 of the Commission's Rules to Permit Limited Transfers and Assignments of Applications in Rural Service Areas*, Notice of Proposed Rulemaking, 5 FCC Rcd 3265, ¶¶ 4-5 (1990) (noting that "the overbreadth of the rule has resulted in the need for an ever increasing number of waiver requests"), see also *Amendment of Section 22.922 of the Commission's Rules to Permit Limited Transfers and Assignments of Applications in Rural Service Areas*, Report and Order, 7 FCC Rcd 7539, ¶ 9 (1992); *NetSat 28 Company, L.L.C.*, Memorandum Opinion and Order, 16 FCC Rcd 11025, ¶ 9 (IB 2001) (overbroad Commission action that undermines a license applicant's financing efforts can warrant relief from Commission rules on equitable grounds).

²² See, e.g., *Requests by Interactive Video and Data Service Auction Winners to Waive the January 18, 1998 and February 28, 1998, Construction Deadlines*, 13 FCC Rcd 756, ¶¶ 4-7 (WTB 1998); *Requests by Interactive Video and Data Service Lottery Winners to Waive the March 28, 1997 Construction Deadline*, Order, 12 FCC Rcd 3181, ¶¶ 5-6 (WTB 1997); *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool Modification of FCC Rule Section 90.627(b) Governing Multiple Sites for Specialized Mobile Radio Service Systems in Rural Markets*, 8 FCC Rcd 3974, ¶¶ 2-4 (1993); see also Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Request for Rule Change and Conditionally Waives Section 1.929(c)(1) to Permit Expansion of Paging Contours Over Water on a Secondary Basis*, 15 FCC Rcd 5563 (WTB 2001) (conditionally waiving paging contour rules in response to a petition for declaratory ruling).

²³ See *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 181 (D.C. Cir. 1993) (citing *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n. 191 (D.C. Cir. 1982)).

Commission has further recognized that the grant of blanket relief can be an administratively effective means of promoting Commission policy objectives.²⁴ All of these factors warrant a grant of an interim conditional waiver as discussed herein.

Petitioners recognize the Commission's well-established policy that it "must not eviscerate a rule by a waiver" and, for this reason, "[t]he Commission has been especially reluctant to grant a waiver when to do so would 'invite numerous other waiver requests which, if granted, would effectively circumvent the Commission's rulemaking function.'"²⁵ These concerns are not present here, however, because only a limited and structured waiver is proposed and it would be necessary only if the Commission is unable to complete the requested proceeding to amend the former defaulter rules in time for amended rules to apply to the 700 MHz Auction.

Further, an interim conditional waiver would not prejudice the outcome of the Commission's consideration of the proposed amendment to the former defaulter rules.

²⁴ See, e.g., *Petitions for Waiver of Part 69 of the Commission's Rules to Establish Switched Access Rate Elements for SONET-based Service*, 11 FCC Rcd 21010, ¶ 26 (1996) (granting relief for similarly-situated ILECs and finding "[t]here is no requirement that the petitioner must distinguish its circumstances from those faced by other, similarly situated customers" and "[w]e do not interpret the requirement that a petitioner must show 'unique circumstances' to mean circumstances that are 'unique' to only one petitioner."); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 4998, ¶¶ 47-49 (1998) (blanket waiver "would serve the public interest by expediting the filing of the tariff revisions necessary to recover the costs of transmitting these payphone-specific digits and by preventing the repeated expenditure of carrier and staff resources to revisit public interest and other issues already examined" in previous Orders); *In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, 8 FCC Rcd 6828, ¶ 90 (1993) (finding grant of blanket relief appropriate where (1) waiver policy is unlikely to attract requests that would, if granted, undermine the underlying policy objective of the rules, (2) application of the rule "would create significant costs and administrative burdens" and undermine other important Commission policy objectives, (3) "the expense and delay of obtaining waivers in individual cases may be prohibitive," and (4) "a blanket waiver will eliminate a significant number of waiver requests thereby reducing the administrative burden on the industry and the Commission, while affecting only a small number of" subscribers).

²⁵ *Nextel Communications, Inc.*, 14 FCC Rcd 11678, ¶ 31 (1999), quoting *Verilink Corp.*, 10 FCC Rcd. 8914, 8916 (1995); see also *Riverphone*, 3 FCC Rcd. 4690, 4692 (1988); see generally *WAIT Radio*, 418 F.2d at 1159 (waiver procedure "emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.").

The waiver sought would apply to applicants to participate in the 700 MHz Auction while the Commission considers the proposed rule change. In the event that, while the 700 MHz Auction is still going on, the Commission decides not to modify the former defaulter rules, it could terminate the waiver and require applicants who would have been former defaulters but for the waiver to submit additional upfront payments in order to maintain their eligibility.

V. CONCLUSION

The Commission's former defaulter rules were adopted to serve valid and important purposes – to protect the integrity of the Commission's auctions process and to encourage participation by serious applicants who can satisfy the financial obligations arising from their auction participation. However, as demonstrated above, the former defaulter rules as currently written are overbroad and are being applied without any qualitative or quantitative limitations. As a result, the rules do not serve their underlying purposes.

In light of the foregoing, Petitioners respectfully request that the Commission initiate a rule making proceeding to amend Sections 1.2105(a)(2)(xi) and 1.2106(a) of its Rules so as to tailor their application to better achieve their goals. In the event that this

rule making proceeding cannot be concluded in time for the 700 MHz Auction, the Commission should issue a limited interim conditional waiver of the rules for that auction, as suggested above.

Respectfully submitted,

DIRECTV GROUP, INC.

ECHOSTAR LLC

By: Stacy Fuller/vrc
Stacy Fuller
Vice President, Regulatory Affairs
444 N. Capitol Street, NW
Suite 728
Washington, DC 20001
(202) 715-2342

By: Linda Kinney/vrc
Linda Kinney
Vice President, Law & Regulation
1233 - 20th Street, NW
Washington, DC 20036
(202) 293-0981

June 8, 2007